

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERTO RODRIGUEZ and DEPARTMENT OF THE ARMY,  
OFFICE OF MILITARY AFFAIRS, Santa Fe, N.M.

*Docket No. 96-966; Submitted on the Record;  
Issued October 22, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly rescinded its acceptance of appellant's claim for a herniated disc at L4-5 and a lumbosacral radiculopathy sustained on March 7, 1993.

The Board finds that the Office properly rescinded its acceptance of appellant's claim for a herniated disc at L4-5 and a lumbosacral radiculopathy sustained on March 7, 1993.

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Federal Employees' Compensation Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.<sup>1</sup> The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.<sup>2</sup> It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.<sup>3</sup> This holds true where, as here, the Office later decides that it has erroneously accepted a claim for compensation. To justify rescission of acceptance, the Office must establish that its prior acceptance was erroneous based on new or different evidence or through new legal argument and/or rationale.<sup>4</sup>

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<sup>1</sup> *Eli Jacobs*, 32 ECAB 1147, 1151 (1981).

<sup>2</sup> *Shelby J. Rycroft*, 44 ECAB 795, 802-03 (1993). *Compare Lorna R. Strong*, 45 ECAB 470, 479-80 (1994).

<sup>3</sup> *See Frank J. Meta, Jr.*, 41 ECAB 115, 124 (1989); *Harold S. McGough*, 36 ECAB 332, 336 (1984).

<sup>4</sup> *Laura H. Hoexter*, 44 ECAB 987, 994 (1993); *Alphonso Walker*, 42 ECAB 129, 132-33 (1990), *petition for recon. denied*, 42 ECAB 659 (1991); *Beth A. Quimby*, 41 ECAB 683, 688 (1990); *Roseanna Brennan*, 41 ECAB 92, 95 (1989), *petition for recon. denied*, 41 ECAB 371 (1990); *Daniel E. Phillips*, 40 ECAB 1111, 1118 (1989), *petition for recon. denied*, 41 ECAB 201 (1990).

In the present case, appellant alleged that he sustained an employment-related back injury during a physical fitness test on March 7, 1993.<sup>5</sup> At the time, appellant was employed as a civilian mobile equipment repair inspector for the employment establishment. In November 1993, the Office accepted that appellant sustained an employment-related herniated disc at L4-5 and a lumbosacral radiculopathy on March 7, 1993.<sup>6</sup> By decision dated October 23, 1995, the Office rescinded, effective October 15, 1995, its acceptance of appellant's claim for a herniated disc at L4-5 and a lumbosacral radiculopathy sustained on March 7, 1993 on the grounds that this injury did not occur in the performance of duty. By decision dated December 7, 1995, the Office denied modification of its October 23, 1995 decision.

The Board notes that the Office submitted sufficient new evidence and argument to justify the rescission of its acceptance of appellant's claim for a herniated disc at L4-5 and a lumbosacral radiculopathy sustained on March 7, 1993. After the November 1993 acceptance of appellant's claim, the record was supplemented to include an April 25, 1994 report, with accompanying documents, which showed that appellant was on active duty with the U.S. Army Reserve when he was injured while participating in a physical fitness test. In showing that it had erred in accepting appellant's claim, the Office presented the new legal argument that Board precedent, including the *Patrick O'Hara* case,<sup>7</sup> showed that an injury sustained by a civilian employee while in a military reserve status does not occur in the performance of duty because such an injury would have an insufficient relation to that employee's civilian job duties. The Office further explained for the first time that the factual circumstances of appellant's claim, *i.e.*, an injury sustained while in military reserve status, dictated that appellant did not sustain an injury in the performance of duty on March 7, 1993. For these reasons, the Office properly rescinded its acceptance of appellant's claim for a herniated disc at L4-5 and a lumbosacral radiculopathy sustained on March 7, 1993.

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<sup>5</sup> Appellant initially indicated that he sustained such injury on March 15, 1993, but the evidence of record shows that appellant participated in the physical fitness test on March 7, 1993.

<sup>6</sup> Appellant also filed a claim alleging that his March 7, 1993 condition was a recurrence of an earlier employment-related back condition but the Office denied this claim by decision dated July 12, 1993.

<sup>7</sup> 34 ECAB 494 (1982); *see also Evelyn Kay Cavness (Jimmy L. Cavness)* 40 ECAB 1016 (1989); *Jerry C. Gilliam*, 39 ECAB 1003 (1988). These cases provide that an injury incurred by a civilian employee solely as a result of his or her participation in a military reserve exercise would not incur in the performance of duty even if membership in a military reserve unit was a requirement of civilian employment.

The decisions of the Office of Workers' Compensation Programs dated December 7 and October 23, 1995 are affirmed.

Dated, Washington, D.C.  
October 22, 1998

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Michael E. Groom  
Alternate Member